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REASONABLE ACCOMMODATIONS

The glass may be half empty, but at least it isn't leaking

by Brinton M. Wilkins

According to Murphy's Law, anything that can go wrong will. That's not exactly a positive statement, especially for employers that have to deal with upset employees who see a lawsuit as a big payday. However, there are things employers can do to blunt the force of Murphy's Law. First and foremost, employers need to understand their legal obligations. Read on to see how one employer made sure its actions complied with the law and avoided the pain caused by Murphy's Law.

Who is Murphy?

Rebecca Murphy was an accounting assistant for Samson Resources Company. According to her job description, regular attendance and punctuality were essential functions of her job.

Murphy suffered from debilitating migraines that sometimes forced her to leave work. Samson tried to accommodate her condition by allowing her to "make up" unplanned absences. By April 2008, however, she was unable to make up all her missed time and had a negative paid time off balance.

Murphy's work was not always up to par. According to Samson's records, in March, May, and August 2008, she made coding, keying, and vendor payments errors. Because of her errors and attendance problems, Murphy's manager, Brenda Bacon, did not forward her application for a land technician position to Samson's HR department.

In June 2008, Murphy asked for leave under the Family and Medical Leave Act (FMLA), and she used FMLA leave when she left work because of migraines. She was also furnished with a short-term disability (STD) policy that ran concurrently with her FMLA leave and provided up to 26 weeks of disability benefits. To receive STD benefits, however, Murphy had to

provide a doctor's note explaining why her absences were necessary. She provided the documentation in October and November 2008.

In mid-November, Murphy gave her employer a neurologist's note excusing her from work until November 20. However, she did not return to work on November 21. Instead, she sent Samson an e-mail saying she would provide a new doctor's note the following week, but she never did, and she never returned to work. On December 1, Samson fired Murphy for abandoning her job.

Murphy sued Samson, alleging it discriminated against her in violation of the Americans with Disabilities Act (ADA). She also alleged that her termination was in retaliation for taking FMLA leave. The trial court dismissed Murphy's claims before trial, and she appealed to the U.S. 10th Circuit Court of Appeals (whose decisions apply to all Utah employers).

Murphy wasn't qualified

To sue for disability discrimination, an employee must show, among other things, that she is qualified for her job with or without a reasonable accommodation. Although the 10th Circuit assumed Murphy's headaches were a disability, it decided that she was not qualified for her position.

To be qualified, Murphy had to show that she could have performed the essential functions of her job if she had been provided with a reasonable accommodation. Essential functions are defined as "the fundamental job duties of the employment position the individual with a disability holds or desires."

Examining Murphy's job description, the 10th Circuit found that regular attendance and punctuality were essential functions of her job. Murphy argued,

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however, that she could fulfill her duties by working a flexible schedule, which she believed was a reasonable accommodation.

Although the 10th Circuit agreed that a flexible schedule can be a reasonable accommodation in some cases, it found that a flexible schedule was not reasonable for Murphy's position given the nature of her work and her need for close and constant supervision. Indeed, if she were allowed to work a flexible schedule, the punctuality requirement of her position would essentially be meaningless. Thus, because there was no reasonable accommodation that would have helped Murphy fulfill her job's essential functions, she was not qualified for her position.

Murphy also argued that additional STD leave was a reasonable accommodation. The 10th Circuit rejected that argument, noting that she was unable to provide an expected return-to-work date. According to the court, unless an employee can provide an idea of when she can return to work, requiring an employer to provide indefinite leave is not reasonable.

10th Circuit finds no retaliation

Murphy argued that Samson violated federal law by retaliating against her for using FMLA leave. To establish her claim, she had to show that (1) she took FMLA leave, (2) Samson took an adverse action against her, and (3) there is a causal connection between the two.

The court determined that Murphy carried her burden. She took FMLA leave and was fired. Further, Bacon refused to submit her application for the land technician position around the same time. Because her termination and Bacon's refusal to submit her application occurred around the same time as her FMLA leave, the 10th Circuit said there may have been a causal connection.

However, Samson presented evidence that its actions were legitimate and nondiscriminatory. Specifically, the company pointed to Murphy's poor work evaluations and the fact that she failed to return to work on November 21, 2008, or provide another doctor's note.

To succeed on her claim, Murphy had to show that her former employer's reasons for terminating her were

merely pretexts (a cover-up) for illegal discrimination. To do that, she had to show "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [Samson's] reasons for its actions, which a reasonable fact finder could rationally find unworthy of credence."

The court found no evidence that Samson's stated reasons for firing Murphy were illegitimate. Indeed, the fact that Bacon's refusal to submit Murphy's application occurred before Murphy requested FMLA leave made it highly unlikely that the manager's actions were retaliatory. *Murphy v. Samson Resources Co.*, 2013 WL 1896822 (10th Cir.).

Lessons learned

Some curmudgeons believe that even the depressing nihilism of Murphy's Law is too optimistic. To them, the glass is not only half empty; it has an unstoppable leak in the bottom, sits in the middle of the Sahara Desert, and is crawling with scorpions. While an employer dragged into a lawsuit may be tempted to feel the same way, there are ways to make even the most depressing situation better.

As this case shows, one way is to keep clear and accurate records. Samson ultimately prevailed because it (1) had a clear job description that made punctuality and regular attendance an essential function of the job and (2) maintained records detailing Murphy's job performance and its attempts to accommodate her—records that she was simply unable to contradict.

Samson's prudent planning and documentation were a bulwark against Murphy's claims. Although the company still ended up in court, its example shows that even Murphy's Law has limitations, caveats, and exceptions.

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